

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)	
)	
Deployment of Wireline)	CC Docket No. 98-147
Service Offering)	
Advanced Telecommunications)	
Services)	

**REPLY COMMENTS OF THE
NATIONAL TELEPHONE COOPERATIVE ASSOCIATION**

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SUMMARY

As demonstrated by the comments submitted by rural ILECs, the Commission should adopt only minimal separation requirements for rural ILECs' subsidiaries. As voiced throughout the comments, the proposed strict structural separation requirements are unnecessary, costly and burdensome for rural ILECs. Rural commentators agree that the high costs and loss of economies make the proposed separate subsidiary option prohibitive for rural ILECs and would deter the deployment of advanced telecommunications services in rural areas. Therefore, the Commission should place the achievement of the universal service goals associated with Section 706 ahead of artificial elimination of the benefits of the existing infrastructure to the advantage of new entrants.

In addition, the Commission should not impose national standards to accommodate the deployment of advanced services. Commentors have emphasized that the technology is rapidly evolving and that national standards of this type are best developed, with the encouragement of the Commission, by industry standards bodies.

Furthermore, the Commission should not endanger the security of rural ILEC networks by not mandating cageless collocation in such areas. Rural ILECs have stressed the significant expense of deploying alternative security systems and the lack of personnel to escort CLEC employees. Moreover, the commission should acknowledge that such collocation is impractical in remote terminals.

Finally, when considering requests to modify LATA boundaries, the Commission should not presume that advanced services are unavailable in areas served by rural telephone companies.

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The National Telephone Cooperative Association ("NTCA") hereby submits its Reply Comments in response to the Commission's Notice of Proposed Rulemaking ("NPRM"), released August 7, 1998.¹

I. Regulatory Relief for Rural ILECs Should Not Be Contingent Upon Strict Structural Separation of Advanced Services Affiliates.

The initial comments of NTCA in this proceeding emphasized that the Commission's proposed deregulatory option for the provision of advanced services is inconsistent with the universal service objectives of Section 706 because it contains conditions impossible for Rural Telephone Companies to meet.² That section requires the Commission to encourage deployment of advanced capabilities to *all Americans* by measures that *either* promote competition *or* remove regulatory

¹ FCC 98-188. The Common Carrier Bureau established the pleading cycle on August 12, 1998, DA 98-1624. NTCA submitted comments in the NPRM on September 25, 1998 and submitted comments in the related Notice of Inquiry ("NOI"), CC Docket No. 98-146, on September 14, 1998.

² NTCA, at 3.

barriers to infrastructure investment.³ The comments of many parties support NTCA's contention that, for rural areas, the goal of universal deployment will best be met by focusing on the removal of regulatory barriers.⁴

A. There is substantial agreement that provision of advanced services through fully separate subsidiaries is impossible for rural ILECs.

The comments of all parties representing rural Incumbent Local Exchange Carriers ("ILECs") agree that it would be financially impossible for a rural ILEC to provide advanced services through a fully separate subsidiary as proposed in the NPRM. USTA commented, "[s]eparate subsidiaries are unnecessary, costly and burdensome duplications of parent company operations for all ILECs especially, small and mid-sized companies."⁵ OPASTCO emphasized, "[t]he fixed costs and lost economies under the Commission's proposed separate subsidiary rules would make the project prohibitive for a small carrier."⁶ Kiesling stressed, imposing the "same BOC separate affiliate structural separation requirements [on rural ILECs] is overly burdensome for rural ILECs where there is limited resources and minimal demand for advanced telecommunications services."⁷ As GVNW stated, "[w]hile the Commission may seek to prevent certain behaviors from occurring in large densely populated urban markets, imposing the identical parameters for rural markets will be an effective

³ 47 U.S.C. 157. *See also* 47 U.S.C. 254.

⁴ *See, e.g.,* Central Texas Telephone Cooperative, Inc. ("CTTC"), at 4; Kiesling, at 5; OPASTCO, at 6; Telecom Consulting Associates, at 7.

⁵ USTA, at 4.

⁶ OPASTCO, at 6.

⁷ Kiesling, at 6.

deterrent to [advanced telecommunications services] deployment." ⁸

The impossibility of expanding service in such an uneconomic manner was shown not only by the industry, but by disinterested observers, such as the United States Small Business Administration ("SBA") which stated that the "[s]eparate affiliate requirements are unrealistic for small ILECs" and that "structural separation requirements are infeasible for small ILECs" SBA further emphasized that,

Small ILECs lack market power. They control a limited number of access lines, and those are vulnerable to competition by larger, more powerful competitors. A small ILEC cannot leverage its conventional voice service business to give it an advantage in advanced services. If the small ILEC were to do so, a competitor could easily come in and undercut the small ILEC's prices. A small ILEC's network is small and can be replicated with a fraction of the cost and effort needed to replicate a RBOC's network. [SBA] contends that small ILECs lack the market power to abuse the data affiliate to the same extent that RBOCs and GTE do. Therefore, the need for strict structural separation requirements is less for small ILECs.⁹

B. The Commission should prescribe minimal separation requirements for rural ILEC subsidiaries.

1. To meet the Act requirement for service to "all Americans," the Commission must recognize different demand and cost factors in rural areas require different treatment for rural ILECs.

NTCA's comments recognized the Commission's legal conclusion that it did not have authority to forebear from enforcing Section 251 of the Act in regard to ILECs. NTCA asserted, however, that the Commission could reasonably conclude that in the low density, high cost areas

⁸ GVNW, at 4. *See also, e.g.*, Cincinnati Bell, at 4; CTTC, at 6; Rural Telecommunications Group, at 8; Telecom Consulting Associates, at 7.

⁹ SBA, at 21. NTCA also agrees with SBA's conclusion that the NPRM does not comply with the Regulatory Flexibility Act, for reasons that have been repeatedly stated for many years, but never addressed by the Commission. *See* SBA, at 5.

served by rural ILECs competitive provision of advanced services is highly unlikely.¹⁰ No comments provided any specific basis for the Commission to conclude that competitive carriers will serve any significant portion of rural residential markets, much less provide advanced services. Thus the optional separate subsidiary path is a meaningless incentive for the rural ILEC. That option neither fulfills the Commission's pro-competitive goals nor the public interest in efficient provision of advanced services.

Inherent in the NPRM's proposal to impose extensive costly duplication requirements on ILECs, as the price of reduced regulation, is the assumption that these requirements will not be a competitive disadvantage to ILECs simply because the additional costs will be no more than any new entrant will face. Assuming, *arguendo*, this assumption is correct, to meet its obligation under Section 706 to encourage deployment of advanced services, the Commission must also have some basis to conclude that advanced services will be widely deployed at rates that recover those costs. Whatever the validity of this second assumption for urban areas, it is simply not correct in rural areas, where loops are much longer and demand is unconcentrated.¹¹ In rural areas, the Commission must recognize that it is only through the economies arising from the provision of existing POTS service that advanced services are likely to be widely deployed anytime in the near future.¹² Because the

¹⁰ NTCA, at 3.

¹¹ At the Roundtable sponsored by the Broadband Task Force on October 6, 1998 Charles Gowder, Manager of NTCA member Valley Telephone Cooperative in Raymondville, Texas described in detail the challenges to provision of ADSL service in an area with 5000 subscribers spread over 7000 square miles.

¹² Comments recognize that rural ILECs are not affected by the proposed structural separation requirements as long as they maintain their 251(f) exemption from providing 251(c) interconnection. However, this protection is illusory because it can be removed by a state commission at any time. Accordingly, rural ILECs cannot confidently invest in advanced telecommunications services if 251(f)

Commission is obligated by the law to remove barriers, it cannot meet that obligation by offering an unusable deregulation option which artificially inflates the rural ILECs' cost of service and destroys the inherent benefit to consumers of their existing facilities and organization.

Whatever may be the philosophical validity of handicapping an inherent natural advantage to benefit competitors of non-rural ILECs, application of this theory to rural ILECS will simply mean that consumers are deprived of comparable and affordable advanced services. Those consumers who do take the services will be burdened with higher costs. As the SBA points out, the Commission significantly overstates the dominance of rural ILECs.¹³ Section 706 was certainly not intended to impose additional regulatory burdens that are not necessary to promote competition or protect consumers.

Instead of a fully separate subsidiary, the Commission should recognize as a non-incumbent a subsidiary of a rural ILEC which is legally separate as a matter of state law and with regard to which the ILEC complies with Parts 32 and 64 of the Commission's Rules. The Commission appears to have modeled the separation requirements in the NPRM after the Section 272(b) requirements applicable to the BOCs. That Section has no relevance whatever to the small Rural LECs, which were not subject to the MFJ. These companies individually are only a tiny fraction of the size of an RBOC and even collectively serve only a small percentage of the nation's access lines.

If that is not sufficient, the maximum tolerable rules are those that the Commission adopted in CC Dockets 96-149 and 96-61, which impose only more limited separation requirements and

protection is necessary to do so.

¹³ SBA, at 22.

explicitly permit the sharing of personnel or other resources or assets.¹⁴

Based on foregoing and the initial comments submitted by rural ILECs in this proceeding, rural carriers, because of their particular market and situation, should not be required to meet the strict separation requirements, but should only be obligated to comply with basic accounting and separation requirements and applicable state law in order for their subsidiaries to avoid Section 251(c) obligations.

2. Parties claiming the separate requirements should apply to all LECs provide no analysis or rationale.

In paragraph 98 of the NPRM, the Commission requested comments on whether the same separation requirements should apply to all advanced services affiliates for them to be deemed not incumbent LECs regardless of the size of the associated incumbent LECs.¹⁵ IXC's, CLEC's, and ISPs made broad sweeping statements that uniform rules should be mandated for all ILEC's.¹⁶ While these commentators may have intended only that the rules apply to BOC's and larger ILEC's, such as GTE

¹⁴ *Regulatory Treatment of LEC provision of Interexchange Services Originating in the LEC's Local Exchange Area and Policy Concerning the Interstate, interexchange Market Place*, CC Docket Nos. 96-149, 96-61, Second Report in CC Docket No. 96-149 and Third Report and Order in CC Docket No. 96-61, 12 FCC Rcd 15756, 15857, ¶ 176 *et seq.* (*LEC Classification Order*), Order on Reconsideration, 12 FCC Rcd 8730 (1997), Order, DA 98-556 (rel. March 24, 1998) (*LEC Classification Partial Stay Order*), *further recon. pending*. NTCA's request for reconsideration of the separate subsidiary requirement imposed by these rules described the problems with subsidiary requirements adopted with regard to interexchange service, especially as to cooperatives. That description is also valid as to an advanced services subsidiary. NTCA recognizes that the proposal in this Docket is an option and not a requirement, and that Section 251 does not apply to interexchange services.

¹⁵ NPRM, at ¶ 98.

¹⁶ *See, e.g.*, AT&T, at 25; GST Telecom, at 16; Internet Access Coalition, at 11.

and Sprint,¹⁷ they fail to justify why rural ILECs should be required to comply with same requirements given their specific circumstances and market presence. For example, AT&T suggested that all ILECs be put on the same footing as their BOC counterparts, which implicitly and erroneously implies that rural carriers have the market power of a BOC.¹⁸ On the other hand, the comments of rural ILECs support and justify why the FCC should not adopt a regulatory option which mandates uniform separation requirements and why the requirements should be relaxed for them.

C. All affiliates of LECs are not "successors or assigns."

Section 251(h)(1)(B)(ii) defines an ILEC to include its "successors or assigns."¹⁹ The Supreme Court has stated that whether a company is a "successor" requires analysis of the interests of the parties and the policies of the law involved "in light of the facts of each case and the particular legal obligation which is at issue."²⁰ Several commentators interpret Section 251(h)(1)(B)(ii) to mean that any transfers of property to an affiliate renders the affiliate an successor or assign and, therefore, conclude that the Commission's proposal will not be sustained even with the structural separation rules.²¹ These parties greatly overstate the plain meaning and purpose of the successor and assign provision.

¹⁷ AT&T, 25.

¹⁸ *Id.*

¹⁹ 47 U.S.C. 251(h)(1)(B)(ii).

²⁰ *Howard Johnson Co. Inc. v. Detroit Local Joint Executive Board, etc.*, 417 U.S. 249, 262 n.9 (1974).

²¹ See, e.g., Allegiance Telecom, Inc., at 17; America's Carriers Telecommunication Association ("ACTA"), at 8; AT&T, at 5; Florida Digital Network, Inc., at 2; MCI, at 49; Sprint, at 4; US West, at 29.

As Cincinnati Bell succinctly stated,

Section 251(h) defines ILEC to mean the local exchange carrier that provide d telephone exchange service in a given area or the entity that afterwards became a successor or assign of the ILEC. The apparent purpose of this provision was t o account for sales, mergers, and consolidations where the identity of the carrier that provided telephone exchange service on the date of the enactment of the 1996 Act in a given area might change. However, there is no indication that transactions with an ILEC that continues in the business of providing telephone exchange access in th e area would render the other company an ILEC as well. So long as the ILEC continues to provide telephone exchange access in the area as it did on the date o f enactment, it should continue to be the only service provider that is deemed an ILEC. Mere transfers of property, personnel, or other assets to an affiliate should not make the affiliate an ILEC when the ILEC continues providing telephone exchange service. This is particularly the case where the new affiliate is providing advanced services, not telephone exchange service.²²

NTCA supports this application of reasoning and policy to the given purpose of the Act in this instance. Accordingly, the Commission should interpret Section 251(h)(1)(B)(ii) in this manner so it can relax its structural separation rules for rural ILECs.

II. The Commission Should Not Impose National Local Loop, Spectrum Management, OSS, and Electronic Connection Standards to Accommodate Advanced Services.

NTCA supports industry comments that the Commission should not impose national local loop, spectrum management, OSS and electronic connection standards. NTCA backs Cincinnati Bell's statement that, "regulatory standards may not be appropriate in an industry marked by such rapid change" and that the establishment of retroactive standards "could have consequences that actually hinder competition."²³ As Sprint mentioned, national standards "are best left to a collaborative process among the appropriate industry representatives through established standards

²² Cincinnati Bell, at 13.

²³ Cincinnati Bell, at 27.

bodies."²⁴

NTCA underscores Bell Atlantic's comment that, "[i]t is entirely premature and unnecessary for the Commission to consider setting [national] standards.... The technology for advanced services, such as XDSL, is still in its infancy and developing very rapidly. Any attempt by the commission to set standards would impede the development and deployment of new innovative technologies."²⁵ "The Commission should therefore continue to allow industry standards bodies to set technical standards."²⁶

NTCA further endorses US West's comment that, "neither the Commission nor any other regulatory body is equipped to develop standards so as to avoid inhibiting future technological changes in loop functionality."²⁷ "In the context of advanced services, there is simply insufficient information to establish nationwide standards at this time. Compulsory standards based on incomplete information could misdirect technological growth and thereby impede the deployment of advanced services."²⁸

For the above mentioned reasons and concerns, the Commission should not attempt to craft and impose any national standards associated with the provision of advanced telecommunications services at this time. The Commission should, however, encourage and facilitate the work of such

²⁴ Sprint, at 21.

²⁵ Bell Atlantic, at 49.

²⁶ *Id.*

²⁷ US West, at 44.

²⁸ *Id.*

industry standards bodies.²⁹

III. Collocation Requires Cages in Rural Areas and is Not Practical at Remote Terminals.

A. Cages are necessary to maintain security in rural areas.

ILECs across the industry have maintained that the Commission should not require cageless collocation due to security reasons.³⁰ As rural commentors have indicated this concern is more pronounced in the unattended offices in rural areas where security systems to protect the underlying ILEC network are not feasible.³¹ Rural commentors have stressed the significant expense to deploy and maintain effective security systems³² and have demonstrated that they do not have the personnel to escort CLEC employees.³³

ILECs have an explicit duty to ensure the reliability and security of their network, which includes protecting it from sabotage and pure negligence by CLECs. They cannot fulfil this duty if non-employees have free access to their central office equipment.³⁴ Therefore, in maintaining the security and integrity of a rural ILEC's network, the FCC should not make such networks vulnerable to the risks associated with cageless collocation and continue to require caged collocation in rural

²⁹ At the October 8, 1998 Technical Roundtable sponsored by the Commission's Bandwidth Task Force and the Common Carrier Bureau, the Chairman of the T1E1.4 Standards Committee indicated such involvement would be welcome.

³⁰ *See, e.g.*, Bell Atlantic at 31; SBC, at 22; Sprint, at 14; US West, at 40.

³¹ *See, e.g.*, Cincinnati Bell, at 23; GVNW, at 6; Kiesling Consulting, at 19.

³² *Id.*

³³ Cincinnati Bell, at 23; Kiesling, at 19.

³⁴ *See* Bell Atlantic, at 34.

areas.

B. Collocation at remote terminals is not practical in rural serving areas.

NTCA agrees with SBA's comments that provisioning collocation at remote terminals for access to subloops would "place an enormous burden on small entities"³⁵ in finding, up keeping and securing such space. In general, rural remote terminals are in outlying territories and do not have sufficient space to accommodate additional equipment.

IV. LATA Boundary Change Inquires Should Not Presume Rural LECs Cannot Provide Advanced Services.

NTCA endorses the FCC's proposal to evaluate each request for intraLATA relief on a case-by-case basis.³⁶ However, in considering any proposal to modify LATA boundaries, the Commission should not presume that high capacity network access points are not available in the areas served by rural ILECs.³⁷ Many rural ILECs are already providing advanced telecommunications services and high capacity network access points in many rural areas.³⁸ Therefore, when considering whether to modify LATA boundaries, the FCC should determine specifically whether broadband or other advanced services are available in such areas.

V. Conclusion

For the above mentioned reasons, the Commission should prescribe minimal separation requirements for rural ILEC affiliates and should not establish national standards associated with the

³⁵ United States Small Business Administration ("SBA"), at 29; *See also* GVNW, at 7.

³⁶ NPRM, at ¶ 193.

³⁷ *See, e.g.*, Bell Atlantic, at 6; US West at 50.

³⁸ *See also* CTTC, at 12.

CERTIFICATE OF SERVICE

I, Philip Macres, certify that a copy of the foregoing Reply Comments of National Telephone Cooperative Association in CC Docket 98-147 was served on this 16th day of October 1998, by hand delivery to International Transcription Services, Inc., 1919 M Street, NW, Room 246, Washington, DC, 20554.

By: /s/
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